Supreme Court, U.S.
FILED

No. 05-53 JUN 14 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BABOUCAR B. & GUYLAINE L. TAAL,

Petitioners,

v.

DOUGLAS & PATRICIA ZWIRNER, KIMBERLY LACEY & STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Respondents.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

BABOUCAR B. TAAL
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Bedford, NH 03110
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QUESTIONS PRESENTED

When petitioners' rights to due process are violated, discovery willfully denied and documented on the record in a Civil Rights claim, how could Summary Judgement be entered against them in a Federal District Court, and an Appeals Circuit arbitrarily affirming.

Failures by both the District court and the Appeals Circuit court to consistently adhere to and give due weight to cited case laws found in U.S. Supreme Court opinions, and the circuit court's very own case law, and faiure to the safeguarding of constitutional guarantees and rights for all, without regards as guaranteed by our U.S. Constitution.

Prejudicial statements made by the District Court at the very start of the trial, and later statements added by the court in its opinion to support its final dismissal of petitioners' case. This being clear violations of not only the canons governing impartiality and fairness demanded of a judge, but the reasonable expectation that the judge hearing one's case does not harbor a preconceived outcome, and the right of everyone and anyone's expectation of *due process*: a course of formal proceeding (as judicial proceeding) carried out regularly, fairly, and in accordance with established rules and principles.

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court is unpublished.

The date on which the United States Court of Appeals decided our case was January 11, 2005.

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 16, 2005, and a copy of the order denying rehearing appears at Appendix B.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

United States Constitution Amendments V & XIV

Case Laws – U.S. Supreme Court & 1st Cir. Appeals Ct.

Federal Statutes

42 U.S.C. § 1981 – Equal Rights Under The Law

42 U.S.C. § 1983 – Civil Actions For Deprivation of Rights

42 U.S.C. § 3617 – Violation Of Fair Housing Act

STATEMENT OF THE CASE

Petitioners' writ rests on the fundamental due process; basic fairness of the process, and as briefly stated under the caption "question presented", and whether a person or persons coming into a court of law has the right to expect and to demand that safeguards found in established rules and case laws be strictly adhered to without regards.

We will start with the flaws and discrepancies in the Appeals Circuit conclusion and affirmation of the district court dismissal of petitioners' case.

In Preliminary Pretrial conference, the district order set forth the beginning of discovery, which petitioners promptly follow by requesting deposition testimonies from respondents through their counsels. Those were rebuffed by counsels for respondents with expected dilatory tactics and excuses. Petitioners advised the court and filed motion

for the clerk to issue subpoenas as Pro se plaintiff. See USDC doc. #47, and #67. Petitioners made four direct requests each for respondents and witnesses to avail themselves for deposition and request for information, all met with willful denial and dilatory tactics by respondents, witnesses and their counsels. The court denied our motion for issue of subpoenas and we made another request from the Court to order them for deposition and request for material evidences from respondents and their agents to no avail. Each time we would make the court of the concerted dilatory tactics employed by respondents and their counsels.

We would again motion the court to order respondents for deposition and/or their agent to comply with the well-founded request for information, to truthfully, completely and timely answer served interrogatories. As the deadline for discovery was fast approaching, we would ask for judicial intervention and immediate relief for these discovery violations by respondents. They would also routinely take the better part 60 to 90 days to rule on petitioners' motions, for emergency motions to order respondents and their agent for deposition or document request, defeating the very purpose of *emergency*.

Take the instances of petitioners' production of document pursuant to F.R.Civ.P. 34(a) scope, (b) procedure and (c) persons not parties, from State Farm Insurance, while petitioner was gathering evidence to defeat their blindsiding summary judgement motion. Under all case law guidance from the U.S. Supreme to sister Appeals Circuits, the law regarding summary judgement is precise and clear that parties opposing summary judgement must be allowed sufficient time not only for discovery but that blindsiding summary judgement must be seen by any

objective judgement for what it is. "F.R.Civ.P. 56(f) provides that a party opposing summary judgement must be allowed adequate opportunity to conduct discovery or otherwise develop evidence in opposition to the summary judgement. Where such a reasonable opportunity to develop materials has not been provided, the motion should be denied or a hearing on the motion continued". *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Respondents denied petitioners' request for documents, failed to be deposed, engaged in concerted efforts to not provide document while district court ignores the violation, yet allowed for these rules violators to carry the day on their various summary judgement. The district court inquired why depositions were not taken at the Final Pretrial Conference, when all this time we repeatedly informed the court in our motions that respondent failed to provide requested discovery evidences.

When the court ruled for State Farm in their Summary judgement motion, we filed a motion for reconsideration as provided in F.R.Civ.P. 56(f) that provides: "should it appear from the affidavits of a party opposing [a motion for summary judgement] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgement or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

The court rather took offense to petitioners' filing for a reconsideration motion to state that we have not had the opportunity to conduct discovery; take depositions and receive requested documents. We were rather faced with blindsiding summary judgement and being sandbagged on

discovery evidences. See USDC doc. #102. The court seemed to ridicule petitioners effort in trying to prevent the miscarriage of justice when we merely pointed out that discovery is incomplete as we are still being denied, and that Rule 56 and case law protects against such tactics. This again gave us a glimpse of the court's preconceived outcome of the case.

Quoting the district court in its April 9, 2003, decision page 2, "Dissatisfied with two Court's orders granting State Farm's motion for summary judgement. Plaintiffs now (appear to) seek relief under Fed. R. Civ. P. 56(f)."

We again requested information pursuant to the provisions of F.R.Civ.P. 34(a) ... phonorecords (c) for person not parties from a Carol Hess, who seem to claim that those phone records are privilege. Petitioner ask for the phone log of a phone call (call origin, time and length of call) between Ms. Hess, Patricia Zwirner and Kim Lacey, and since neither Patricia Zwirner nor Kim Lacey were Ms. Hess's clients there is no attorney-client privilege here. This phone call we contended was not only for the purpose of suborning perjury, but also part of the continued conspiracy to deny petitioners their right to a fair trial. This phone call took place literally less than 24 hours before Kim Lacey made false testimony and yet denied in open court she spoke to Patricia Zwirner the day before.

The court denied petitioners the basic right to discovery from non a party, with material information whose only refusal to comply is a non existing privilege. In *U.S. v. Adlman*, 69 F.3d 1495, 1501 (2nd Cir. 1995) interpreting Federal Rule of Civil Procedure 26(b)(3), "protections of the work product doctrine do not apply unless the material were prepared or obtained ..." As parties in an ongoing

lawsuit, we have the right to request material evidences to present to a jury. "A party moving for summary judgement bears the burden of demonstrating the absence of genuine issue of material fact and that it is entitled to judgement as a matter of law." See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Upon receipt of each respondents summary judgement motion, petitioners would immediately file motions with the court asking for a F.R.Civ.P. 56 hearings in light of the outright denials and failures to comply by respondents, and to be allowed to called witnesses with the court requesting. The court again would pile these time sensitive motions and rule on them 60-90 days later with a predictable denial and to quote the court " . . . oral argument would not prove helpful in this case; the matters in issue are resolvable on the pleading." See Order 5/21/03.

Petitioners avoiding the trap set, would still file a timely response (again while their motion requesting Rule 56 hearing is pending) to the summary judgement motions stating that we are still waiting to take depositions of respondents and receive requested material evidences.

Everything would be allowed to lie dormant by the court but with repeated denial of petitioners' motion seeking judicial intervention and relief until the scheduled Final Pretrial Conference, which the court cancelled without notice, on the Friday before the Monday. On the rescheduled date two weeks later petitioners not knowing what to expect with no notice from the court, and after prior excusing respondents from attending this Final pretrial conference, of which petitioners objected, as it would have provided an opportunity to answer question on the record.

During this conference, the court after finally concluding petitioners were denied discovery, but yet was not cognizance of the facts that almost every motion from the plaintiffs indicated that respondent had fail to comply with discovery rules with dilatory tactics, fail to avail themselves for deposition and instructed their agent and other witnesses to deny discovery. As on the Preliminary Pretrial conference, the court made the determination on the record that the State case between a *Baboucar Taal v. Douglas Zwirner*, that substantive justice was missing as all the claims were not adjudicated, but yet accepted res judicata and collateral estoppel in this federal case barring Guylaine Taal, Baboucar Taal, M. Barra Taal, and Abdou Taal claim against Patricia Zwirner, Douglas Zwirner, State Farm Mutual Automobile Insurance Company and Kim Lacey (dismissing Douglas Zwirner from the federal case and denying M. Barra and Abdou Taal's because they are minors even though petitioners as parents and guardian signed the complaint on their behalf).

"Before ruling on summary judgement, we think that the district court should have looked more carefully into those issues and ascertained whether plaintiffs have received a full and fair chance to discover relevant information in the hands of defendants." *Carmona v. Toledo*, No. 99-1246 (1st Cir. 2000). This was a case law guidance for district courts.

The district court after denying our motions for the clerk to issue subpoenas, for requesting material documents and to take deposition testimonies, and despite repeatedly being made aware of the delay and deny tactics employed of respondents, their agents and counsels, in one order referenced us to F.R.Civ.P. 45 that refers to issue of subpoenas (by Pro Se). Petitioners filed motion asking the

court for order for the clerk to issue the subpoenas, the court denied the motion. We filed a motion for clarification as how the court would refer us to Rule 45 and then turn around and deny the motion asking the court for direction to the clerk regarding the subpoenas.

The more puzzling moment would later come during the Final Pretrial Conference, when midway, the court would turn around and said that this conference is now a Rule 56 hearing without any notice to petitioners, and despite as six and five months earlier denying them their request for Rule 56 to defeat the respondent blindsided summary judgement. The court never gave petitioner notice to prepare to defend and allow them to cull the best evidence forward, in light of the repeated denial of discovery evidences by respondents, and without the benefit of calling witnesses and respondents testifying, as the court had excused their attendance despite petitioners' objection.

Petitioners objected on the record to the court's pattern of changing course at the disadvantage of petitioners without notice. We indicated to the court that we were not noticed and were not prepared to defeat a summary judgement/Rule 56 hearing which the court said was not necessary, nor did we bring along deposition questions to ask respondents who are not present at this rescheduled Final Pretrial conference. The court in its order gave petitioners the indication that they have sustained their summary judgement objection in light of the discovery denials by respondents and witnesses they are associated with.

The court again would turn around and dismiss respondent Lacey, order respondent Patricia Zwirner to

avail her herself for a deposition, order both respondent Lacey and Zwirner to comply with petitioners' request for information and order counsels for Zwirner and for State Farm to produce requested documentation requested by petitioners seven months earlier.

To "the question, rather is whether the court gave the plaintiff a meaningful opportunity to cull the best evidence supporting his position, and to present that evidence, together with developed legal argumentation, in opposition to the entry of summary judgement." See *Stella v. Town of Tewksbury*, 4 F.3d 53 (1st Cir. 1993). The record is that the district court never gave petitioners notice of the changing the Final Pretrial conference to a Rule 56 hearing, and that discovery is not a right for petitioners, and they have to list all the questions that they would like to ask respondents and witnesses to the court and respondents counsels.

When discovery is appropriately initiated, the burden of compliance lies foremost with the party from whom the discovery is sought." *Resolution Trust Corp. v. Northbridge Assoc.*, 22 F.3d 1198, 1206 (1st Cir. 1994).

Petitioner would receive correspondence from respondent Lacey (who the court has dismissed from the case with no incentive to comply) that she has no material to turn over, and this would be followed by a coordinated letter from counsel for Zwirner that she also has no material to turn over to petitioners. With reference to the requested documentation from State Farm, they had chosen to provide a date rather than the documentation requested.

The deposition of respondent Zwirner was finally taken and filed with the court, replete with willful material falsity

she admitted on the record and was repeatedly told by her counsel not to answer questions, not because they object to the form, but rather it would constitute inconsistent material facts, thus "issues of material facts", requiring the case to be preserved for the jury as finders of facts. Parenthetically the court in its final ruling made no mention of the material inconsistencies but rather added – "The FBI's record (as filed) reflect similar types of the complaints by the Zwirner against the Taal: name calling, trespassing repeated glaring at them and their children, etc." (USDC doc. #166). This was flat out incorrect, but the court found it necessary to add in its order to remotely justify dismissing our claim.

All of these concerted tactics employed by respondents inconsistent with the provision found in the safeguards of established rules and principles culminated in district court own additions not supported by the facts as they exist at the time to justify its dismissal and were the basis and relied upon for the Appeals circuit's affirmation of the district court order. By the Appeals Circuit affirming the district courts orders, and since there is no detailed explanation on the record, the Circuit Court failed to rule on when petitioners (appellants-plaintiffs) had full and fair opportunity to gather discoverable material evidences to be presented at trial and/or defeat all summary judgement by respondent on sua sponte.

As the Circuit court in its unpublished opinion did not shed any light on these critical issue of material points of the case one can only surmise that de novo, i.e., full review of the record as required in any summary judgement is thus incomplete as the record as it stood supported petitioners contention that elemental justice, i.e., basic due

process and fundamental justice, i.e., constitutional rights, protection and guarantees were denied.

REASONS FOR GRANTING THE PETITION

The reasons are two fold:

One, that established rules and principles offer not only safeguards but provide assurance that the system is fair, equitable and just and that the integrity of the system of justice rests on consistency, Fairness and Equity and Justice to all without regards. Respondents engage and employ dilatory tactics as a strategy, flagrantly disregarded flouted the rules and therefore should not be allowed to benefit from subverting our constitution.

The U.S. Supreme Court being the last arbiter of resorts, we asked that this esteem body be the first assure substantive justice, and to reverse and remand consistent its record of Fairness, equity and justice for all. Full and Fair Applications of our rules and laws are crucial to a live democracy.

CONCLUSION

Federal Rules of procedures offer safeguards to a process of seeking and receiving justice, as they are codified through the rules making process and congressional acts to ensure fairness of the process and fairness to parties who chose to use judicial process.

The Appeals court in affirming contradicted many of their own case laws but again pointedly on one particular case of which two of the three hearing our appeal reverse a district court and stated:

> "The issue here is one of process and fundamental fairness, not one of substance". *Rogan v. Menino*, 175 F.3d 75, 80 (1st Cir. 1999). Statements like these "We need go no further, We make no determination on the merits or We take no view on the merit (or lack of)" are found in countless numbers of both published and unpublished decisions of higher courts:
>
> > "... litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim due process prohibits estopping them." See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Bernhard*, 19 Cal. 2d, at 811, 122 P.2d, at 894. The U.S. Supreme Court stated in *Bruszewski v. United States*, 181 F.2d 419, 421 (CA3 1950), 340 U.S. 865 (1950), that "the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata."

This being case law guidance from the U.S. Supreme Court to Appeals Circuits and district courts.

The process calling material evidences in a discovery process for presentation to a neutral finding of facts have been allowed to work as this U.S. Supreme Court has time and time again insisted on strict adherence to established

rules, the law (case law guidance) and the Constitution. We therefor ask that justice be done and this case for constitutional rights guarantees and protections be upheld. Departure from established safeguards affects us all as it has the tendency to erode confidence in the system.

In *Stella v. Town of Tewksbury*, 4 F.3d 53, 56 (1st Cir. 1993) the Circuit Court stated that "to protect against erosion of the fairness principle embedded in Fed. R. Civ. P. 56, a Court tempted to grant an unbesought summary judgement must adhere to Rule 56's procedural strictures." We could not have said it anymore clearly and precise and this was another quoted case law that both the Appeals Circuit and district court ignored in our civil rights case.

It is interesting yet puzzling that the district court stated in its order of 5/21/03 page 2 that our effort to seek to Fed. R. Civ. P. 56 relief is a sign of dissatisfaction and that protection we seek is "neither properly supported nor is timely." See same order page 3. But when we filed the Rule 56 hearing request for the subsequent blindsided summary judgement from respondent Lacey & Zwirmer, the Court initially said it would not be helpful. They then turned around on the final pretrial conference and said this conference was now that Rule 56 hearing, and was untimely at some point, unhelpful at another and very necessary now, or you lose on summary judgement. It looks very much like justice was never going to happen at this district court.

The petition for the writ of certiorari should be granted.

Respectfully submitted,

BABOUCAR B. TAAL – Pro se Petitioner

GUYLAINE L. TAAL – Pro se Petitioner

Date: 6/14/05

APPENDIX A

Not For Publication in West's Federal Reporter
Citation Limited Pursuant to 1st Cir. Loc. R. 32.3

United States Court of Appeals

For the First Circuit

No. 04-1463

BABOUCAR B. TAAL; GUYLAINE L. TAAL,

Plaintiffs, Appellants,

v.

PATRICIA ZWIRNER, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Steven J. McAuliffe, *U.S. District Judge*]

Before

Torruella, Circuit Judge,
Campbell, Senior Circuit Judge,
and Selya, Circuit Judge.

Baboucar B. Taal and Guylaine L. Taal on brief pro se.

Fred J. Desmarais, Debra L. Mayotte and Desmarais, Ewing & Johnston, PLLC on brief for appellees Patricia Zwirner and Douglas Zwirner.

Christopher J. Pyles and Wiggin & Nourie, P.A. on brief for appellee Kim Lacey.

Russell F. Hilliard and Upton & Hatfield, LLP on brief for appellee State Farm Mutual Automobile Insurance Company.

January 11, 2005

Per Curiam. After carefully considering the record and briefs on appeal, we *affirm* for substantially the reasons stated by the district court.

At summary judgment, the appellants failed to produce any evidence that would tend to show a genuine dispute of material fact concerning any claim. That is a fatal defect. *Griggs-Ryan* v. *Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

We would add that among other problems, their claims against Douglas Zwirner were properly dismissed on the ground of res judicata. *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003). Their claims against others arising from alleged perjury were properly dismissed on the ground of immunity. *Stoutt* v. *Banco Popular de Puerto Rico*, 320 F.3d 26, 33 (1st Cir. 2003). And they offered no evidence that any defendant conspired to hinder or abridge protected rights. *Santiago* v. *Canon U.S.A., Inc.*, 138 F.3d 1, 6 (1st Cir. 1998); *Cadle Co.* v. *Hayes*, 116 F.3d 957, 960 (1st Cir. 1997); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995).

Affirmed. 1st Cir. Rule 27(c).

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 04-1463

BABOUCAR B. TAAL, ET AL.,

Plaintiffs, Appellants,

v.

PATRICIA ZWIRNER, ET AL.,

Defendants, Appellees.

Before

Boudin, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
Torruella, Selya, Lynch,
Lipez and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: March 16, 2005

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

[cc: Baboucar B. Taal, Guylaine L. Taal, Fred J. Desmarais, Esq., Debra L. Mayotte, Esq., Christopher J. Pyles, Esq., Russell F. Hilliard, Esq.]

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On Petition For Writ Of Certiorari To United States Court Of Appeals For The First Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

BABOUCAR B. TAAL
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Baboucar B. Taal, and
Guylaine L. Taal,
Plaintiffs

v.

Patricia Zwirner,
Defendant

Civil No. 02-131-M
Opinion No. 2004 DNH 054

ORDER

(Filed Mar. 22, 2004)

Pro se plaintiffs, Baboucar B. Taal and his wife, Guylaine, filed this federal suit against several parties alleging racially discriminatory behavior, a conspiracy to violate their civil rights, and various violations of the Fair Housing Act. The original cast of defendants included Douglas P. Zwirner, his wife, Patricia, Kim Lacey, and State Farm Mutual Automobile Insurance Company. The Zwirners and Taals were next-door neighbors in Bedford, New Hampshire (the Zwirners have since moved); Lacey still resides across the street from the Taals, and State Farm employed Mrs. Zwirner and provided the Zwirners with insurance coverage of some sort.

This suit was preceded by state litigation brought by Baboucar Taal against Douglas Zwirner in the New Hampshire Superior Court (Hillsborough North, Docket No. 01-C-111). Taal's claims in that case were virtually identical to those advanced here. In his state Writ, dated February 7, 2001, Taal claimed:

> For 21 months myself and my family were constantly subjected to, by defendant; threatened physical force, trespass and vandalism to property, communicated by conduct and declaration; of constant verbal threats, lewd and obscene gestures and intimidation, with the expressive purpose to terrorize and coerce us to move, interfering and violating with our civil rights and individual liberties under the United States Constitution and federal law and New Hampshire Civil Rights act, motivated by race, color and national origin. For that we seek damages of ($1+$2.1 million)[.]

That case was tried to verdict. The jury awarded Taal $2,000 in damages on a trespass count.

In this suit, the allegations are substantively identical, although they are lodged against additional defendants. The amended federal complaint asserts, in pertinent part, that:

> 4. Defendants Douglas and Patricia engaged in Racial Harassment, Intimidation, Terrorizing of myself, my wife and our children along with Trespassing on and Vandalizing of our property. We reported these acts to the Bedford Police Department of literally more than 100 of these incidences. The Zwirners and Kim Lacey colluded and conspired to give false, misleading and inconsistent statements to law enforcement agencies, hindering their efforts to stop these acts thus denying, hindering and obstructing our right of equal protection under the law. Ms. Lacey came to State court and gave false and misleading statement under oath purposefully to obstruct and defeat our efforts in seeking justice.

5. Between January 1999 to September 2000, the Zwirners lived next-door to us and defendant Lacey across the street on Essex Road, in Bedford. For 21 months and more the Zwirners engaged in Racial Hara[s]sment, Intimidation Threatening and Terrorizing myself, my wife and children continuously and constantly trespassing and vandalizing our property. Defendant Lacey while being aware of these acts enjoyed our continuous torment, talked about it to other neighbors, told investigators that she know nothing about it, despite Douglas saying that she and others were aware of what was going on. Ms. Lacey in her deception and making false and misleading statements, told a story of the Police Chief coming to her home and told her of the department investigating a fence dispute. The Chief of Police has stated that he has never met, talked to or gone to her house. Ms Lacey and the Zwirner concocted another story of when they first met, only to have Douglas Zwirner not sticking to that story line, all of this done under oath. Ms Lacey denied speaking to the Zwirners less than 24 hours before she came to testify and started to give a story about the last time they spoke being months ago, I stopped her and then she admitted that they spoke the day before.

* * *

7. The evident need to constantly give false, misleading and inconsistent statement not only show the continued deceptive efforts to defeat, hinder and obstruct our right to due justice but also denied us the afforded equal rights and protection under the law. These defendants being fully aware of their actions continuously and constantly engaged in these acts, despite our communicating to them and asking them to stop.

> They got bolder in their actions, and at one point intimated to another neighbor that they want to "keep the neighborhood white", they would continue engage in making lewd gestures and conduct, yelling racial slurs, gesturing his middle finger, spitting and heckling all of these in front of our kids. All of these would happen every time our garage door opens and or when we are outside on our driveway playing with our kids. The Zwirner found it necessary to come back to the neighborhood even after they move out to engage in stalking and intimidation under the pretext of being invited to a birthday party that he did not know whose or what age.

Amended Complaint (document no. 14) ¶¶ 4, 5 and 7.

The complaint also alleges that State Farm, "their [the Zwirners'] employer and insurer," knew of the harassment, provided "equipment, material comfort and counsel," and "directly and indirectly participated in the conspiracy to violate and interfere with our civil rights. . . . They allowed, furnished and directed the Zwirners to take pictures, engage in computer generated harassing phone calls, using the same computers to perpetrate and concoct the conspiracy with Defendant Lacey. They together engaged in violation of the exercise and or enjoyment of our rights under the Fair Housing Act." *Id.*, ¶ 6.

State Farm filed a well-supported motion for summary judgment, and judgment was entered on the merits in its favor earlier in the case. Similarly, defendant Kim Lacey filed a well-supported motion for summary judgment and judgment was entered on the merits in her favor

as well.[1] The claims asserted against defendant Douglas Zwirner in this suit were dismissed on res judicata grounds, since it is plain that those claims could have been, and in fact largely were, asserted against Zwirner in the state litigation that preceded this case.[2] *See In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 755-56 (1st Cir. 1994) (where two suits involve the same transactions or series of transactions, a prior judgment in the first suit is conclusive as to all issues which were actually litigated or which could have been litigated).

What remains of this case, then, are the claims against defendant Patricia Zwirner. She, too, has filed a well-supported motion for summary judgment, and, once

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[1] Although it is often difficult to tell just what plaintiffs are specifically alleging, the court determined that the gist of their complaints against Lacey was that she did not testify truthfully in the earlier state civil trial. After reviewing the submitted transcript extracts and the record, this court agreed with the state trial judge that Lacey did not, as plaintiffs allege, testify in a contradictory way about any material matter at all. No evidence was offered suggesting that she engaged in any conspiracy to deprive plaintiffs of their civil rights, and, to the extent plaintiffs were suing Lacey based upon her state court testimony, she was entitled to immunity. *See Stoutt v. Banco Popular De Puerto Rico*, 320 F.3d 26, 33 (1st Cir. 2003) (the common law absolute immunity of witnesses is a well-recognized limitation on constitutional as well as other torts); *Watterson v. Page*, 987 F.2d 1, 9 (1st Cir. 1993).

[2] The substance of the state Writ is set out above and raises claims of racial harassment and civil rights conspiracies, as well as claims that facially describe Fair Housing Act violations, in addition to trespass and other state law claims, at least when read liberally. The parties have not provided much by way of procedural history of the state litigation, but it is clear from the submitted verdict form in the state case that only the trespass claim went to the jury. Plaintiff recovered $2,000 on that claim, and unsuccessfully sought a new trial and other post-judgment relief.

again, plaintiffs have not offered any evidence – and the record, viewed most favorably to plaintiffs, does not suggest any – sufficient to create a genuine dispute as to material facts, or a trial-worthy issue.

To be sure, the amended complaint describes disturbing and unacceptable racial bigotry in broad and general terms guaranteed to garner attention (i.e., racial harassment, terrorizing, and vandalizing). But, beyond broad-form and conclusory allegations, plaintiffs have produced almost nothing by way of evidence, or even descriptions of specific events, from which a reasonable jury could find for them on any asserted federal claim. Accordingly, for the reasons discussed below, Patricia Zwirner's motion for summary judgment is also granted.

Standard of Review

When ruling on a party's motion for summary judgment, the court must "view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment is appropriate when the record reveals "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In this context, "a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." *Intern'l Ass'n of Machinists & Aero. Workers v. Winship Green Nursing Ctr.,* 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted).

Nevertheless, if the non-moving party's "evidence is merely colorable, or is not significantly probative," no genuine dispute as to a material fact has been proved, and "summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). As the Court of Appeals for the First Circuit has observed, "the evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve at an ensuing trial. Conclusory allegations, improbable inferences, and unsupported speculation will not suffice." *Cadle Co. v. Hayes*, 116 F.3d 957, 960 (1st Cir. 1997) (citations and internal quotation marks omitted). *See also Coyne v. City of Somerville*, 972 F.2d 440, 444-45 (1st Cir. 1992) ("[T]hough for pleading purposes the line between sufficient facts and insufficient conclusions is often blurred, we nonetheless require that it be plotted.") (citation and internal punctuation omitted).

The key, then, to defeating a properly supported motion for summary judgment is the non-movant's ability to support his or her claims concerning disputed material facts with *evidence* that conflicts with that proffered by the moving party. *See generally* Fed. R. Civ. P. 56(e). Consequently, while a reviewing court must take into account all properly documented facts, it may ignore bald assertions, unsupported conclusions, and mere speculation, *see Serapion v. Martinez*, 119 F.3d 982, 987 (1st Cir. 1997), as well as those allegations "which have since been conclusively contradicted by [the non-moving party's] concessions or otherwise," *Chongris v. Bd. of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987).

Background

Defendant Patricia Zwirner is alleged to have conspired with her husband Douglas Zwirner, her neighbor Kim Lacey, and State Farm, to deprive plaintiffs of their civil rights. When pressed for specific facts that would support such a claim, plaintiffs have consistently relied upon mere reiteration of the charge itself, unsupported accusations of unethical conduct on the part of defense counsel, and, occasionally, broad conclusory statements unsupported by affidavit or other evidence. *See, e.g.*, Pl.'s Obj. to Def. Zwirner's Mot. for Summ. J. (document no. 127); Mot. Seeking Ruling of What Remains of Pls.' Case (document no. 163); Tr., Final Pretrial Conf. (document no. 165).

While it must seem to pro se litigants that courts do not do enough to help them present and litigate their claims, parties opposing pro se litigants probably think courts go much too far in bending over backwards to accommodate even meritless pro se claims. Any practicing attorney would likely attest to the fact that litigating against pro se parties is far more difficult, frustrating, expensive, and counter-productive than litigating against their most accomplished professional colleagues. In this case, plaintiffs have been afforded every opportunity to produce what evidence they can to support their legal theories. Most recently, plaintiffs were afforded additional time to conduct late discovery, including taking the deposition of Patricia Zwirner. The time has now come to hold them to the applicable legal standards in resolving this litigation.

The record discloses that the Taals and Zwirners bought and moved into newly constructed homes that were

built closer to each other than the Zwirners expected. The Zwirners made no secret of the fact that they were unhappy with the builder about that close proximity. The Taals erected a fence between the properties and a dispute over its location quickly arose. That dispute blossomed into continuous bickering between the neighbors. A series of complaints and counter-complaints were made over the ensuing months to the local police department and, eventually, the F.B.I. Taal at one point complained to the F.B.I. that Douglas Zwirner engaged in "racial verbal and physical harassment (via gestures)" toward him. Exhibit B, Def.'s Mot. for Summ. J. (document no. 124). Investigations by the local police and the F.B.I. did not result in any official action. The F.B.I.'s records (as filed) reflect similar types of complaints by the Zwirners against the Taals: name calling, trespassing, repeated glaring at them and their children, etc. Among the few specifics offered by the Taals in the record are descriptions of golf balls being chipped onto their yard or into their pool, sticks (Taal calls them "logs") being tossed over the fence, and similar bickering nuisances.

Taal pressed a criminal complaint against Douglas Zwirner at one point, alleging that Zwirner criminally threatened him. Zwirner was acquitted.

Discussion

I. The Conspiracy Claim – 42 U.S.C. § 1985(3).

Patricia Zwirner has filed an affidavit in which she denies being involved in any conspiracy to violate plaintiffs' civil rights. She denies vandalizing, trespassing, or racially harassing plaintiffs. She points out that she only met Kim Lacey just before she moved from Bedford in

September of 2000, while the conflict between the Zwirners and Taals long preceded that acquaintance. (Defendant Zwirner and her family sold their home and moved following the conflict with the Taals.)

In opposition to Zwirner's motion for summary judgment, plaintiffs filed a videotape that they say constitutes evidence of harassment and intimidation. But, that tape shows nothing of the sort. The first portion of the tape consists of Douglas Zwirner's deposition in the state case. The remainder of the videotape (seemingly taken from Taals' home) shows a man (presumably Zwirner) benignly walking by on what appears to be a public sidewalk, apparently in front of the Taals' home. It then depicts an incident during which a man (again presumably Zwirner) relaxing peacefully in his own yard. He discovers that he is being videotaped and he responds by retrieving his own video camera and taping the person (presumably Taal) who is taping him.

The tape is not evidence of harassment, or terrorizing, or vandalizing by the Zwirners. If anything, the tape documents a provocative and un-neighborly intrusion initiated by the Taals. The intrusive behavior by Taal was, unfortunately, promptly mimicked by Douglas Zwirner. Significantly, what the videotape also reveals is that the defendant here, Patricia Zwirner, interceded with her husband, obviously talking him into calming down and leading him into his home to end the confrontation – a confrontation that, by all appearances on the tape, was initiated by the Taals. So, as explained to the plaintiffs during the pretrial conference, the tape hardly constitutes evidence supportive of their claims. On the contrary, it is evidence that they, not the Zwirners, were the provocateurs, at least on this documented occasion. If there are

other acts by the Zwirners upon which plaintiffs are relying, no evidence has been offered to establish or describe them.

Although plaintiffs are prone to dramatic language, claiming "hundreds" of incidents demonstrating racial animosity, and asserting that "every time" they went outside they were harassed, the court has been unable to extract much by way of evidence of, or even a specific factual description of what occurred on the particular occasions underlying this suit, save for the few incidents described above, i.e., who did or said what, and when. The specific complaints reflected in plaintiffs' general statements, or as described in the various police reports filed in support of defendant's motion, reveal little more than neighbors engaged in bickering and feuding, and exchanging harsh charges.

It is, of course, unlawful for persons to conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities, or for the purpose of hindering constituted authorities from securing equal protection to all persons. 42 U.S.C. § 1985(3). There is no state action involved in this case, and, in order to establish a private conspiracy under the deprivation clause of § 1985(3), a plaintiff must show not only a racial (or other class-based invidiously discriminatory) animus behind the conspirators' actions, but also that the conspiracy is aimed at interfering with rights protected against private as well as official encroachment. The Supreme Court has recognized only two such rights for deprivation clause purposes – the right to be free from involuntary servitude and the right of interstate travel. *See Griffin v.*

SUPPLEMENTAL APPENDIX

Breckenridge, 403 U.S. 88, 102 (1971); *Carpenters & Joiners, Local 610 v. Scott,* 463 U.S. 825, 833 (1983).

Plaintiffs do not assert an abridgement of either right, and nothing in the record suggests the existence of factual support for such a claim.

While plaintiffs do not seem to be asserting a claim under the "hindrance clause" of § 1985(3), *see generally Libertad v. Welch,* 53 F.3d 428, 446-50 (1st Cir. 1995), it might be argued that they are (e.g., to the extent they suggest a conspiracy by Patricia Zwirner and Kim Lacey to lie to law enforcement authorities in order to interfere with the authorities' ability to stop the alleged harassment). But once again, no adequate factual basis for such a claim can be found in this record. Lacey was apparently interviewed by law enforcement authorities, who were responding to Taal's many complaints, and said she was generally aware of a dispute between the Zwirners and Taals over a fence, but otherwise was not aware of specific confrontative incidents. Patricia Zwirner denies conspiring with Lacey or anyone else to lie to the police, denies lying herself, or testifying falsely, and denies any race-based animus. Nothing in the record suggests otherwise. At most, plaintiffs have offered some evidence that *Douglas* Zwirner used a "racial epithet" and made a lewd gesture, but otherwise simply assert in broad terms that "they" harassed and terrorized – but without specifics. A hindrance clause claim necessarily fails because there is no factual basis on this record from which a jury could find that the right allegedly infringed by the supposed conspiracy was a right constitutionally protected or guaranteed, or that the purpose and effect of the supposed conspiracy was to impede state officials in their efforts to secure equal protection of the laws. *Id.* It is simply not enough to allege,

in dramatic terms, that a conspiracy existed, or must have existed, based merely on the difference in race between unneighborly antagonists. *See Mass v. McClenahan,* 893 F. Supp. 225, 231 (S.D.N.Y. 1995).

Plaintiffs have not offered any evidence of Patricia Zwirner's acts and statements, nor have they produced any other evidence from which a conspiracy to deprive them of civil rights might be found. They seem to contend that her testimony in the state litigation is evidence of a conspiracy, but it is not. Perhaps they also filed a videotape of the recent deposition of Patricia Zwirner as support for their claim that she somehow "lied" about matters in dispute. But they do not identify any testimony they consider to be untruthful or that might support a conspiracy claim, nor do they offer evidence from which a jury could conclude that the unspecified testimony was untruthful, nor do they explain how any untruthful testimony might be related to a conspiracy to deprive them of constitutionally protected civil rights. There is simply nothing in this record from which a reasonable jury could conclude, by a preponderance of the evidence, that Patricia Zwirner conspired with anyone to deprive plaintiffs of any civil rights.

Indeed, there is much less here than was presented in *Manego v. Cape Cod Five Cents Sav. Bank,* 692 F.2d 174 (1st Cir. 1982). In that case, plaintiff claimed he was denied a license to operate a disco because of his race; that, within half a year after being turned down, a disco license was issued to a white applicant; that someone had set fire to his property; and that unnamed persons had uttered racial slurs. While those facts certainly warranted pursuit, plaintiff in that case, like the plaintiffs here, simply did not develop evidence that might support what

in that case was an obvious suspicion. The court of appeals noted, and shared, the district judge's frustration, pointing out that Rule 56(e) placed upon the plaintiff the burden of producing evidence of the conspiracy he alleged after defendants showed that the facts upon which he relied to support his allegations were not susceptible to the interpretation he sought to give them.

The court is well aware that plaintiffs miss no opportunity to complain that they have been denied discovery, but the record does not support that claim either. They have had every opportunity to engage in discovery and to develop their case, but have either failed to act, or failed to act in accordance with the applicable rules of procedure, or failed to act consistently with the orders of the court.

Nevertheless, at the final pretrial conference the court again pressed Taal on just what additional discovery he thought he needed or wanted, what evidence he had his [sic] or thought might be developed, and how that evidence might tend to support his claims.[3] His answers were, again, difficult to follow, but he did state that he needed Patricia Zwirner's deposition as well as copies of e-mails between Zwirner and Lacey. The court thereupon delayed ruling on Zwirner's pending motion for summary judgment, ordered any existing e-mails to be produced, and directed Zwirner to submit to a late deposition. In addition, the court extended a final opportunity to plaintiffs to submit whatever they could in opposition to the pending

[3] To the extent plaintiffs were seeking relief under Fed. R. Civ. P. 56(f), the request was untimely, not adequately supported, and unjustified. Nevertheless, plaintiffs were, once again, permitted to take Patricia Zwirner's deposition, obtain e-mails, and supplement their opposition to summary judgment.

motion for summary judgment. They filed only a copy of Patricia Zwirner's deposition, without brief, and without identifying just what in that deposition they thought supported any of their federal claims. As in *Manego,* smoke alone (and there is little evidentiary smoke here) is not enough to force defendant to trial to prove that her actions were not discriminatory.

II. The Fair Housing Act Claim.

Plaintiffs have also asserted a Fair Housing Act claim. The Fair Housing Act ("FHA") 42 U.S.C. § 3601, et seq., is intended "to provide within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. "Thus, it is intended to promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups, whose lack of opportunities the Act was designed to combat.'" *Ohana v. 180 Prospect Place Realty Corp.,* 996 F. Supp. 238, 240 (E.D.N.Y. 1998) (quoting *Otero v. New York City Hous. Auth.,* 484 F.2d 1122, 1134 (2d Cir. 1973)).

Although there is some disagreement among courts that have considered the point, this court will assume that the provisions of 42 U.S.C. § 3617 provide a separate and substantive basis upon which to base liability under the FHA. *See, e.g., Ohana,* 996 F. Supp. at 241-42 (collecting cases). Section 3617 provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of

> this title. This section may be enforced by appropriate civil action.

Section 3617 has been applied somewhat broadly to cover various forms of interference with housing rights protected by the FHA, but, of course, with due regard for competing First Amendment rights. *See White v. Lee,* 227 F.3d 1214, 1230 (9th Cir. 2000). Speech can amount to a violation of § 3617 only when it is "directed to inciting or producing imminent violence and is likely in fact to do so." *Id.* Threats of violence, coercion, and intimidation directed against individuals, however, do not qualify as advocacy, and may well constitute a violation of § 3617. *Id.*

Reviewing plaintiffs' amended complaint in the light most favorable to them, it does, in general terms, state a claim under § 3617, although it is decidedly short on facts and long on conclusions. *See generally, Ohana,* 996 F. Supp. at 243. But, at this stage, the issue before the court is not whether the amended complaint should be dismissed, but whether summary judgment should be entered in favor of Patricia Zwirner.

The difficulty for plaintiffs, once again, is that they have offered no admissible evidence, nor even described any provable facts, from which a reasonable jury could find by a preponderance that this defendant, Patricia Zwirner, coerced, intimidated, threatened, or interfered with plaintiffs' enjoyment of their home because of their race, color, or national origin. And, the record suggests none.

To be sure, plaintiffs level broad and generalized claims of racial harassment "every day" and "hundreds of times," but, with regard to Patricia Zwirner, offer no factual descriptions of specific acts and offer no evidence.

Considering the record in the light most favorable to plaintiffs, the parties opposing summary judgment, it is apparent that the only specific complaint lodged against Mrs. Zwirner is that she supposedly did not testify truthfully during the earlier state court trial – though, again, plaintiffs point to nothing that supports such a claim, or even raises a triable issue of *material* fact related to that claim. Plaintiffs have not described or offered any evidence of any specific incidents during which Patricia Zwirner said something that might reasonably be viewed as threatening, or did something that would constitute vandalism or amount to coercion, or did something that would terrify a reasonable person in plaintiffs' position or that would suggest some racial animus on her part. And, of course, Mrs. Zwirner, like all witnesses, enjoys absolute immunity from liability for her testimony at the state trial. *See Watterston,* 987 F.2d at 9.

Moreover, there is no evidence offered, or specific claim made, that Mrs. Zwirner engaged in any extreme or overt acts that would qualify as intimidation or coercion under § 3617. *See, e.g., Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n,* 208 F. Supp. 2d 896, 903-06 (N.D. Ill. 2002) (collecting cases regarding level of severity of conduct necessary to constitute an FHA violation). For example, plaintiffs do not offer evidence (or assert) that defendant engaged in fire bombing their home or cars, was implicated in cross burnings, physically assaulted them, threatened to physically assault them, threw rocks through windows, fired weapons, or engaged in extreme concerted disruptive activities designed to interfere with their quiet enjoyment of their home – the types of extreme or severe conduct that courts have recognized as actionable under § 3617. At best, what

plaintiffs have shown is that they were engaged in a long-standing, often immature dispute with their neighbors and, on one documented occasion of friction, *they* were the instigators or provocateurs, and on another Douglas, not Patricia, Zwirner uttered a racial epithet and made a lewd gesture.

As courts have generally agreed, "it seems clear enough that to bring a claim within § 3617, a plaintiff must allege conduct on the part of a defendant which in some way or other implicates the concerns expressed by Congress in the FHA. If it were otherwise, the FHA would federalize any dispute involving residences and people who live in them. Nothing in the statute or its legislative history supports so startling a proposition." *Id.* at 904 (quoting *United States v. Weiz,* 914 F. Supp. 1050, 1054 (S.D.N.Y. 1996)); *see also Egan v. Schmock,* 93 F. Supp. 2d 1090, 1093 (N.D. Cal. 2000) (Congress did not intend § 3617 to cover *any* discriminatory conduct interfering with a person's quiet enjoyment of his or her home, otherwise "any dispute between neighbors of different races or religions could result in a lawsuit in a federal court under the FHA.").

That is not to say that only shockingly severe and violent conduct will meet the threshold requirements of a § 3617 claim. One can imagine a moderate level of intentional and persistent nuisance behavior, motivated by racial or religious animus, and directed at a victim over a sufficient period of time that might prove so disruptive and coercive as to warrant relief under § 3617. *See, e.g., Ohana,* 996 F. Supp. at 241-42. But this is not such a case, at least not on this record.

To reiterate, the pending motion is one for summary judgment, and broad-form conclusory allegations will not suffice. Facts, from which a violation could be found by a reasonable jury, must be identified if summary judgment is to be avoided. Notwithstanding ample opportunity to do so, plaintiffs have failed to point to evidence supporting the existence of genuinely disputed material facts or a trial-worthy issue on their § 3617 claim.

While there can be little doubt that the Taals and the Zwirners did not get along, and that on at least one occasion defendant's husband, Douglas Zwirner, resorted to racial epithets and lewd gestures, that is not enough to establish an FHA claim under § 3617. Congress did not intend the FHA to provide a remedy for every squabble, even continuing squabbles, between neighbors of different races. Broad-form claims aside, nothing plaintiffs have presented suggests the type of conduct intended to be covered by § 3617.

As noted in *Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 6 (1st Cir. 1998), subjective characterizations and perceptions of discriminatory conduct are not enough to avoid summary judgment. The "district court cannot accept, on faith, conclusory assessments by claimants that unspecified and unattributed epithets were 'derogatory' and 'denigrating,' let alone demonstrated discriminatory intent." *Id.* Bare conclusory allegations, parroted without elaboration in a Rule 56 proffer, do not suffice to identify either the nature of the acts complained of, the pertinent facts, or the identity or motive of the actors. *Id.* at 5. "The object of [Fed. R. Civ. P. 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Id.* at 6 (quoting *Jones v.*

Merchants Nat'l Bank & Trust Co., 42 F.3d 1054, 1059 (7th Cir. 1994)).

There being no genuine dispute as to any material fact, and defendant being entitled to judgment as a matter of law on the undisputed facts of record, summary judgment is granted in favor of defendant Patricia Zwirner on plaintiffs' claims under the Fair Housing Act.

III. State Law Claims.

To the extent the amended complaint might be construed to assert state law causes of action, the court declines to exercise supplemental jurisdiction over those claims. *See Camelio v. American Fed'n*, 137 F.3d 666, 672 (1st Cir. 1998).

Conclusion

The court is well aware of the difficulties faced by pro se litigants as they attempt to pursue legal claims in federal court. And, mindful of those difficulties, the court has extended plaintiffs every reasonable opportunity to develop their case – perhaps to the detriment and, no doubt, substantial added expense, of defendants. At this point, however, it is clear that affording plaintiffs additional time and/or discovery in an effort to shore up their unsupported claims would prove futile. On this record, it is plain that the sole remaining defendant, Patricia Zwirner, is entitled to judgment as a matter of law on all of plaintiffs' federal claims against her.

Defendant Patricia Zwirner's motion for summary judgment (document no. 124) is granted in part and denied in part. As to the federal claims asserted against her,

Zwirner is entitled to judgment as a matter of law. To the extent plaintiffs' complaint might be read to allege state law claims against Zwirner, the court declines to exercise its supplemental jurisdiction, and those claims are dismissed. The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

/s/ Steven J. McAuliffe
Steven J. McAuliffe
United States District Judge

March 22, 2004

cc: Baboucar B. Taal, pro se
Guylaine L. Taal, pro se
Wilfred J. Desmarais, Jr., Esq.
Russell F. Hilliard, Esq.
Christopher J. Pyles, Esq.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Baboucar B. Taal, et al.[1]

v. Civil No. 02-131-M

Douglas & Patricia Zwirner, et al.

REPORT AND RECOMMENDATION

(Filed May 14, 2002)

Before the court is *pro se* plaintiff Baboucar B. Taal. Taal has brought this suit pursuant to 42 U.S.C. § 1985, seeking damages for the alleged conspiracy of his neighbors, Douglas and Patricia Zwirner and Kim Lacey, to violate and interfere with his civil rights. Because plaintiff has brought this action *pro* se, the complaint is before me for preliminary review to determine whether this Court's jurisdiction has been invoked. *See* United States District Court for the District of New Hampshire Local Rules ("LR") 4.3(d)(1)(A). For the reasons that follow, I recommend this complaint be dismissed as it fails to invoke the subject matter jurisdiction of this Court.

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[1] Taal has named himself and his family as plaintiffs to this action. Only Taal himself has signed the complaint. It is well-settled that parties to a lawsuit cannot be represented by anyone other than themselves or a member of the bar. *See* 28 U.S.C. § 1654; *see also* Local Rules of the United States District Court for the District of New Hampshire ("LR") 83.2(d)("Persons who are not members of the bar . . . will be allowed to appear before this court only on their own behalf.") and LR 83.6(b) ("*Pro se* parties must appear personally. . . . A *pro se* party may not authorize another person who is not a member of the bar of this court to appear on his or her behalf"). Therefore, I will construe this complaint as naming only Taal individually as a plaintiff to this action.

Standard of Review

In reviewing a *pro se* complaint, this Court is obliged to construe the pleading liberally. *See Avala Serrano v. Lebron Gonzales*, 909 F.2d 8, 15 (1st Cir. 1990) (following *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) to construe *pro se* pleadings liberally in favor of that party). At this preliminary stage of review, all factual assertions made by the plaintiff and inferences reasonably drawn therefrom must be accepted as true. *See Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996) (stating the "failure to state a claim" standard of review and explaining that all "well-pleaded factual averments," not bald assertions, must be accepted as true). This review ensures that *pro se* pleadings are given fair and meaningful consideration. *See Eveland v. Dir. of C.I.A.*, 843 F.2d 46, 49 (1st Cir. 1988).

Background

Taal alleges that defendants Douglas and Patricia Zwirner and Kim Lacey were his neighbors from January of 1999 to September of 2000. During that time, the defendant neighbors, according to Taal, racially harassed, intimidated, and terrorized Taal, his wife, and his children and vandalized their property. Taal reported the harassing behavior to the police. The Zwirners and Lacey conspired with each other to give false statements to the police. Taal alleges that the defendants' behavior violated his civil rights and his right to due process of law. Taal also alleges that State Farm Insurance, acting as the Zwirners' agent, participated in the harassment of Taal and his family.

Discussion

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 US. 375, 377 (1994). The presumption is that a federal court lacks jurisdiction. *Id.* Consequently, the burden is on the plaintiff who claims jurisdiction to affirmatively allege jurisdiction and prove it. *Id.*; *see also Bender v. Williamsport Sch. Dist.*, 475 U.S. 534, 541 (1986). To bring a civil action within the court's subject matter jurisdiction, a plaintiff must allege that his action either involves a federal question, or involves citizens from different states and an amount in controversy in excess of $75,000. *See* 28 U.S.C. §§ 1331 & 1332. If it appears that the court lacks subject matter jurisdiction over the matter, the court is required to dismiss the action. Fed. R. Civ. P. 12(h)(3).

Turning to the case at hand, the complaint is clearly insufficient to invoke the subject matter jurisdiction of this court. First, although plaintiff has sued for twenty-one million dollars, and has therefore met the amount in controversy requirement of 28 U.S.C. § 1332, the complaint does not allege that the parties are citizens of different states. In fact, the complaint alleges a neighborhood dispute with all of the parties residing in New Hampshire at the time of filing. Therefore, Taal has not alleged diversity jurisdiction. *See* 28 U.S.C. § 1332.

Secondly, although it appears that Taal has tried to invoke the federal question jurisdiction of this Court pursuant to 28 U.S.C. § 1331, he has failed to do so. Taal has alleged that the defendants, private persons, have violated his constitutional rights. The United States Constitution "erects no shield against merely private conduct, however discriminatory or wrongful." *Blum v. Yarketsky*, 457 U.S. 991, 1002 (1981). A plaintiff claiming an infringement of his civil rights by individual defendants must establish

that (i) the defendants deprived plaintiff of a right secured by the Constitution or laws of the United States, and that (ii) the defendants acted under "color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia." 42 U.S.C. § 1983. Taal does not allege that, at any relevant time, the defendants were acting under color of state law. Taal does allege that the defendants were engaged in a conspiracy, but not that they were engaged in a conspiracy with state actors that might serve to allow their actions to be treated as taken under color of law.

Conclusion

Taal has failed to allege a claim under 42 U.S.C. § 1985 and has presented no other federal question. As stated above, he has not alleged diversity jurisdiction either. He has therefore failed to invoke the subject matter jurisdiction of this Court. I recommend that the claims be dismissed. *See* LR 4.3(d)(1)(A).

Any objections to this Report and Recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. *See Unauthorized Practice of Law Comm. v. Gordon*, 979 F.2d 11, 13-14 (1st Cir. 1992); *United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986).

/s/ James R. Muirhead
James R. Muirhead
United States Magistrate Judge

Date: May 14, 2002

cc: Baboucar B. Taal, *pro se*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Baboucar Taal,
Plaintiff

v.

Civil No. 02-131-M

Douglas Zwirner, Patricia Zwirner, State Farm Insurance Co., and Kim Lacey,
Defendants

ORDER

(Filed May 31, 2002)

Pro se plaintiff, Baboucar Taal, filed a civil complaint against defendants, alleging that they conspired to deprive him and his family members of their civil rights, in violation of 42 U.S.C. § 1985(3). Pursuant to the court's local rules, the matter was referred to the Magistrate Judge to conduct a preliminary review and "determine if the filings establish subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." Local Rule 4.3(d)(1)(A). After reviewing plaintiff's complaint, the Magistrate Judge issued a Report and Recommendation, in which he recommended that the complaint be dismissed for lack of subject matter jurisdiction. Plaintiff filed a timely objection.

Discussion

Pursuant to 28 U.S.C. §636(b)(1), the court reviews *de novo* those portions of a report and recommendation to which a party has filed a timely objection. As part of its review, the court may, "accept, reject, or modify, in whole or in part, the findings or recommendations made by the

magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." *Id.*

In concluding that plaintiff's complaint fails to invoke this court's subject matter jurisdiction, the Magistrate Judge observed that "a plaintiff claiming an infringement of his civil rights by individual defendants must establish . . . that the defendants acted under 'color of state law.'" Report and Recommendation at 4-5. Because plaintiff's complaint does not allege that any of the defendants acted under color of state law (or in concert with state actors), the Magistrate Judge concluded that plaintiff's complaint fails to allege a viable cause of action over which this court has subject matter jurisdiction. Plaintiff disagrees and, in his objection, asserts that "[s]tate action is not required under § 1985 if a conspiracy by private persons to discriminate on the basis of race is alleged." Plaintiff's objection at para. 2.

Plaintiff is, at least in part, correct. The Supreme Court has held that 42 U.S.C. § 1985(3) *does* apply to private conspiracies (i.e., those that do not involve state actors or state action). *See, e.g., Griffin v. Breckenridge,* 403 U.S. 88, 101 (1971) ("It is thus evident that all indicators – text, companion provisions, and legislative history – point unwaveringly to § 1985(3)'s coverage of private conspiracies."). Importantly, however, the Court has also noted that the circumstances under which private conspiracies fall within the scope of § 1985(3) are very limited. *See id.* ("That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."). *See also United Brotherhood of Carpenters v. Scott,* 463 U.S. 825 (1983).

In 1993, the Supreme Court again emphasized the limited reach of § 1985(3) with regard to private conspiracies.

> In *Carpenters,* we rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3). The statute does not apply, we said, to private conspiracies that are "aimed at a right that is by definition a right. only against state interference," but applies only to such conspiracies as are "aimed at interfering with rights . . . protected against private, as well as official, encroachment. There are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude and, in the same Thirteenth Amendment context, the right of interstate travel).

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993) (citations omitted). *See also Libertad v. Welch,* 53 F.3d 428, 449-50 (1st Cir. 1995) ("Claims brought specifically under the *deprivation* clause of § 1985(3) – that is, alleging that a private conspiracy is aimed at the *deprivation* of a constitutional right – must therefore allege that the right infringed is one guaranteed against both official and private encroachment.") (emphasis in original).

Conclusion

The plaintiff's objection to the Report and Recommendation (document no. 4) is sustained. The Magistrate Judge erred as a matter of law in concluding that, to state a viable cause of action under § 1985(3), a plaintiff must necessarily allege some form of state action.

In the first instance, the court leaves it to the Magistrate Judge to determine whether plaintiff's complaint alleges sufficient facts to bring defendants' alleged private conspiracy(s) within the scope of § 1985(3) and whether it properly invokes this court's subject matter jurisdiction. *See* Local Rule 4.3(d)(1)(A). The matter is, therefore, remanded to the Magistrate Judge for further proceedings consistent with this opinion. *See* 28 U.S.C. §636(b)(1).

SO ORDERED.

/s/ Steven J. McAuliffe
Steven J. McAuliffe
United States District Judge

May 31, 2002

cc: Baboucar B. Taal